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18 CORPORATION, ACCSTATION INC.,
19 ITRIMMING INC., and
20 EVERYDAYSOURCE INC.*

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

15 APPLE INC., a California corporation,
16 Plaintiff,

17 v.

18 EFORCITY CORPORATION, a
19 California corporation; ACCSTATION
20 INC., a California corporation;
21 ITRIMMING INC., a California
22 corporation; EVERYDAYSOURCE
23 INC., a California corporation;
24 UNITED INTEGRAL INC., a
25 California corporation;
26 CRAZYONDIGITAL, INC., a
27 California corporation; and
BOXWAVE CORPORATION, a
Nevada corporation; and DOES 1
through 20, inclusive,

Defendants.

CASE NO. CV 10-03216 JF
Honorable Jeremy Fogel

**DEFENDANTS EFORCITY
CORPORATION, ACCSTATION
INC., ITRIMMING INC. AND
EVERYDAYSOURCE INC'S
REPLY TO PLAINTIFF'S
OPPOSITION TO MOTION TO
DISMISS CLAIMS FOR RELIEF 1-
10 OF PLAINTIFF'S COMPLAINT;**

DATE: April 1, 2011

TIME: 9:00 a.m.

PLACE: Courtroom 3

TRIAL DATE: None Set

1 The eForCity Defendants reply to Apple's Opposition as follows:

2 **The First through Tenth Claims for Relief Fail to State Sufficient Facts**

3 Each of Apple's first through tenth claims for relief are virtually identical,
 4 changing only the identity of the products and patent while using the same generic
 5 allegations. Apple's asserts that its allegations of infringement are based on
 6 "information and belief" that defendants "distribute[s] and/or sell[s]" items that
 7 "directly infringe" on patents through defendants "manufacture, use, sale,
 8 importation and/or offer for sale."

9 Apple's infringement language is limited and without explanation of the
 10 inventions or patents described and without allegations that the specifically
 11 identified products or product components also do what the patent does, thereby
 12 failing to raise a plausible claim that the named products are infringing. In *Bender*
 13 *v. LG Elecs. USA, Inc.*, No. C 09-02114 JF (PVT), (2010) WL 889541 *2 (N.D. Cal.
 14 Mar. 11, 2010), the Court upheld this standard in dismissing plaintiff's complaint
 15 for failing to plead sufficient facts as a result of similarly limited allegations.

16 Under the authority set forth in the moving papers and this reply, as well
 17 asunder the *Bender* holding, plaintiff must do more than allege conclusions. A
 18 patentee plaintiff must provide fair notice to the defendant(s) of the specific
 19 infringements alleged, a description of the patents and how the products infringed.
 20 Apple has failed to do so and the complaint should be dismissed.

21 **Similar Vague Allegations by Apple Have Previously Been Stricken**

22 The complaint alleges that defendants infringed "at least" seven claims
 23 related to seven different patents while reserving the ability to amend the complaint
 24 with regard to 223 additional claims found in those patents. If permitted by the
 25 Court to proceed with this civil action on the basis of the complaint as filed, Apple's
 26 vague reference to "at least" would provide Apple with the ability to later allege
 27 infringements with no notice of the infringement, no allegation as whether
 28 infringement is direct or indirect, and with no factual allegations to support these

1 potential claims as of the date of filing of its Complaint, and thus would impose on
 2 defendants the time constraints of the case as originally filed. The opposition makes
 3 no effort to justify these additional potential claims and provides no evidence or
 4 argument that Apple has any information or evidence to support any additional
 5 claims. Apple should not be permitted to post a few conclusory allegations and
 6 reserve hundreds of other potential claims to the detriment of the defendants.

7 Not only are these allegations insufficient to state a claim for relief, almost
 8 identical allegations have been found by the Northern District to be insufficient. In
 9 *Elan Microelectronics v. Apple, Inc.* No. C 09-01531 RS, 2009 WL 4247790 (N.D.
 10 Cal. Sept. 14, 2009) *Elan* brought a motion to dismiss Apple's cross-claims for
 11 patent infringement.

12 The *Elan* court noted:

13 The Supreme Court has made clear that while "showing" an entitlement
 14 to relief does not require "detailed factual allegations," it does
 15 "demand[] more than an unadorned, the-defendant-unlawfully-
 16 harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173
 17 L. Ed. 2d 868 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 18 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Thus, "[a] pleading
 19 that offers 'labels and conclusions' or 'a formulaic recitation of the
 20 elements of a cause of action will not do.' [citation.] Nor does a
 21 complaint suffice if it tenders 'naked assertion[s]' devoid of 'further
 22 factual enhancement.'" *Id.*

23 Apple's formulaic complaint pleads few actual facts of infringement other
 24 than listing patents and a list of products with a conclusion that defendants infringed
 25 on Apple's patents. In *Elan* the Court noted that Apple's allegation of infringement
 26 in all three of the challenged counterclaims consisted of nothing more than a bare
 27 assertion, made "on information and belief" that *Elan* "has been and is currently,
 28 directly and/or indirectly infringing, in violation of 35 U.S.C. § 271" the specified
 29 patents "through its design, marketing, manufacture and/or sale of touch sensitive
 30 input devices or touchpads, including but not limited to the Smart-Pad."

1 Apple uses almost identical language in this action – based on “information
 2 and belief” defendants “distribute[s] and/or sells” items that “directly infringe” on
 3 patents through defendants “manufacture, use, sale, importation and/or offer for
 4 sale. . . .” In addition, Apple’s complaint contains language that would allow Apple
 5 to allege 223 additional claims related to its patents but it provides absolutely no
 6 allegations or information that reasonably place defendants on notice. The
 7 complaint contains no information regarding whether the 223 potential infringement
 8 claims are direct or indirect, contain no “short and plain statement of a claim”
 9 related to any of them, and contain no facts whatsoever regarding them. The
 10 complaint allegations are simple “naked assertions devoid of factual enhancement,”
 11 which should fail.

12 By pleading an infringement of “at least” one claim for each patent, Apple
 13 attempts to sidestep the pleading requirements by leaving open additional claims
 14 which it may or may not make. Such a tactic thus is calculated to force defendants
 15 to either expend resources to defend every claim or guess which claims Apple may
 16 later decide to allege infringement. This attempt to plead as little as possible falls
 17 within the prohibition against “[t]hreadbare recitals of the elements of a cause of
 18 action,” supported here by no factual allegations, (*Ashcroft v. Iqbal*, 556 U.S. __,
 19 129 S.Ct. 1937 (2009)) and the Court should not permit such vague pleadings.

20 Here, Apple attempts to distinguish *Elan* claiming that it only has alleged
 21 direct infringement and therefore under the holding in *McZeal* its pleading is
 22 sufficient. However, here Apple attempts to allege multiple claims of infringement
 23 related to multiple patents with literally hundreds of potential claims, but without
 24 supporting facts, or allegations. This language basically allows Apple to add claims
 25 at a later date by pleading absolutely no supporting facts, while preserving the
 26 benefit of having the case management timing rules dictated to a significant extent
 27 by the filing date of the complaint. This attempt to “game” the system is contrary to

1 the well established pleading requirements, operates to the unfair disadvantage of
2 and prejudice to the eForCity Defendants and should not be permitted by the Court.

3 **Conclusion**

4 In order for Apple to properly plead a cause of action it must provide
5 sufficient detail to allow the defendants to understand the claim asserted. By
6 pleading generic recitals of elements with little or no facts Plaintiffs complaint fails.
7 For the reasons set forth in this moving papers and this reply the eForCity
8 Defendants request that the Court grant their motion and dismiss the first through
9 Tenth Claims for Relief.

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11 DATED: March 18, 2011

LEWIS BRISBOIS BISGAARD & SMITH LLP

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By: /s/ Jon E. Hokanson

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